BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BEN WAGONER	)	
Claimant	)	
V.	)	
	)	
PUR-O-ZONE, INC.	)	Docket No. 1,061,395
Respondent	)	
AND	)	
	)	
CINCINNATI INDEMNITY COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent requested review of Administrative Law Judge Steven J. Howard's August 14, 2013 Award and August 20, 2013 Award Nunc Pro Tunc (hereinafter Award). Insofar as the Award Nunc Pro Tunc supercedes the Award, the amended Award is controlling. The Board heard oral argument on December 3, 2013.

APPEARANCES

Claimant appeared pro se. Ryan D. Weltz, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. The record does not include attachments to claimant's submission brief filed October 22, 2013.

ISSUES

Claimant injured his left knee on January 4, 2011 when getting into his truck. The Award indicated claimant's accidental injury arose out of and in the course of his employment, resulting in claimant sustaining a 20% impairment to his left leg.

Respondent requests the Award be reversed, arguing claimant failed to prove compensability because his injury was the result of day-to-day activity, not due to an employment risk. Respondent further asserts claimant failed to prove he is entitled to permanent partial disability compensation because there is no medical evidence regarding causation. In the alternative, respondent argues claimant has preexisting impairment for which it is entitled to a credit.

Claimant maintains the Award should be affirmed because entering and exiting vehicles was an inherent part of his job which exposed him to greater risk of injury.

The issues for the Board's review are:

- Did claimant's accidental injury arise out of and in the course of his employment?
- What is the nature and extent of claimant's disability?
- Is claimant entitled to future and unauthorized medical treatment?

FINDINGS OF FACT

Claimant has worked for respondent as a traveling salesman and service technician for 22 years. He generally does not go to an office and leaves directly from his home to where the work is to be performed. Claimant testified his job requires him to get into and out of a vehicle at least seven times a day and perhaps as many as 15 or 20 times a day. He testified without contradiction that his job requires him to get into and out of vehicles on a regular and more frequent basis than what a normal person would do. Respondent provided him with credit cards to use for gas and overnight stays.

When making sales/service calls, claimant normally uses a company-owned vehicle, a 2007 Ford Freestar. However, whenever the company-owned vehicle is in the shop or he has a task requiring a vehicle with towing or capacity capabilities, he uses his personal vehicle, a Ford F-150 pickup truck. Claimant testified he uses his personal vehicle usually once or twice a month, and that respondent is well aware of and permits this occurrence and often allows him to use the company credit card to fill his truck with gas.

Claimant woke up the morning of January 4, 2011 and was feeling "very well."[1] He did not experience any problems or notice anything out of the ordinary with respect to his knees. Claimant moved his truck from his driveway to the street to load it with chemicals.

Claimant spent approximately 20 minutes loading his truck with equipment and supplies needed to perform his job. Prior to loading, claimant had no difficulty getting in and out of the vehicle. He used his personal vehicle that day because the five-gallon chemical containers he was loading would not fit inside the company van. Claimant was not getting into and out of his truck as he loaded the five-gallon chemical containers into the truck bed. Claimant indicated there were no specific events or accidents that occurred while loading the vehicle and he was still feeling fine after loading was complete.

---

[1] R.H. Trans. at 24.

Claimant loaded one object, a test kit, into the cab of his truck the morning of the accident. The test kit measured approximately 12" long, 6" wide and 6" high, and he did not fully enter the vehicle, but simply placed the test kit on the seat.

Around 5:30 a.m., subsequent to all of the loading, claimant was stepping into his truck to depart to his first scheduled service call when he felt a pop in his left knee. The vehicle had running boards along the side which were in good repair and undamaged. Claimant indicated there was nothing abnormal about the surface he was walking on, and he saw no obvious defects in the street or anything out of the ordinary with regard to the ground and surface. Claimant was not wearing any clothing or holding or carrying any objects that would have caused his accident. Claimant testified he has never had any prior difficulty or problems getting into or out of the company-owned vehicle or his personal vehicles, which includes his wife's 2006 Mercury Mariner.

Claimant indicated there was really nothing different about the way he got into the vehicle as compared to prior instances of getting into a vehicle. He stated: "[i]t's the same. I don't have any difficulties except that one particular day when I got in the truck and my foot stuck and I twisted my knee. I don't have any difficulties getting into or out of any of the vehicles except that one incident."[2] He further stated: "I simply stepped on the running board, and when I turned to get in it twisted my knee."[3] When questioned regarding what he thought might have caused his knee to pop on the date of accident, claimant stated: "[t]he only thing I can say is that I got into the vehicle, and while getting into the vehicle it twisted my knee. I cannot tell you why."[4]

After the injury, claimant was unable to walk. He pulled himself into his truck and drove to the emergency room at St. Luke's West where he was admitted, provided a brace and advised to follow-up with a physician. Claimant scheduled an appointment with T. J. Rasmussen, M.D. A few hours later, he reported the accident to Mark Elsea, respondent's president. Respondent designated Dr. Rasmussen as the authorized treating physician. On July 21, 2011, claimant underwent left knee arthroscopic surgery by Dr. Rasmussen. Specifically, claimant had a medial meniscectomy and tricompartmental chondroplasty.

On November 26, 2012, the court ordered Terrence Pratt, M.D., to perform an independent medical evaluation for purposes of providing an impairment rating. Dr. Pratt was instructed not to address causation or restrictions.

---

[2] *Id*. at 20.

[3] *Id*. at 27.

[4] *Id*. at 28.

Dr. Pratt evaluated claimant on January 17, 2013. Claimant complained of persistent left knee pain, intermittent weakness without numbness, and that his knee intermittently would give away without significant locking and catching. He denied any prior involvement of the left knee. However, Dr. Pratt's report noted medical records from 2006 – about six and one-half years before the evaluation – showing some left knee complaints. Dr. Pratt diagnosed claimant with left knee dysfunction, status post procedure with medial meniscectomy, tricompartmental chondroplasty for medial meniscus tear and tricompartmental arthrosis. Dr. Pratt assigned a 20% impairment to the left leg pursuant to the AMA *Guides.*[5]

At the regular hearing, claimant testified he did not have any prior mechanical type problems of grinding, popping or dislocation involving the left knee. Respondent placed into evidence medical records from 2006 showing claimant had enough knee pain on June 13, 2006 that he was unable to walk and needed to use a wheelchair. Claimant reported at that time that his left knee would pop. Claimant was diagnosed with left patella femoral syndrome and left SI joint arthropathy with piriformis muscle spasms. Physical therapy was prescribed. June 14 and June 15, 2006 reports from a therapist and Sean Wheeler, M.D., also noted left knee pain. A July 6, 2006 report from Constantine Fotopoulos, M.D., noted left hip, left thigh, left knee, left lower leg, left ankle, left foot, left toes and back pain. Dr. Fotopoulos' assessment was not listed, although he prescribed physical therapy and brought up the possibility of left-sided epidural steroid injections to L5 and S1.

The prior left knee medical records do not discuss mechanical type left knee problems, left knee grinding or left knee dislocation. The records mentioned pain and popping. Respondent acknowledged at oral argument that the record contains no evidence claimant had a preexisting meniscus injury involving the left knee.

In respondent's brief to Judge Howard, it argued the claim should be barred based on K.S.A. 2010 Supp. 44-508(f), commonly known as the going and coming rule. Respondent contended claimant was not at work because he had not yet started toward his work site, notwithstanding the fact claimant had already spent 20 minutes loading the vehicle and was injured getting into his vehicle for his first service call. Respondent also asserted K.S.A. 2010 Supp. 44-508(e) barred the claim. Such statute states, "An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living." Respondent argued claimant was performing a day-to-day activity of getting into his truck, a risk to which he was equally exposed apart from work.

Judge Howard ruled the claim compensable. Judge Howard cited a few cases involving application of the going and coming rule and noted:

---

[5] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

> Under the factual situation presented herein, claimant was not on his way to assume him [sic] duties to or from work. Claimant's unrefuted testimony is that he commenced working for the respondent with the loading of the chemical containers some 20 minutes before the incident occurred. Hence, claimant was clearly involved in the pursuit of his employer[']s business, and the testimony is unrefuted that claimant made sales calls between 5:00-5:30am due to the nature of the business and the service that was required of the clientele he provided services. Accordingly, it [is] specifically determined that claimant had commenced his employment with the respondent on that date, that the respondent was clearly aware that claimant utilized his personal vehicle to service, or call upon customers some 1-2 times per month, that claimant had an appropriate credit card to utilize his personal vehicle or his company vehicle, and that claimant sustained an injury while involved in activity which arose out and in the course of his employment with respondent.[6]

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee for personal injury by accident arising out of and in the course of employment.[7] The burden of proof – that a party's position on an issue is more probably true than not true – is on claimant.[8]

Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[9] The two phrases arising "out of" and "in the course of" employment have separate and distinct meanings; they are conjunctive, and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[10]

---

[6] ALJ Nunc Pro Tunc Award at 4.

[7] K.S.A. 2010 Supp. 44-501(a).

[8] K.S.A. 2010 Supp. 44-501(a) and K.S.A. 2010 Supp. 44-508(g).

[9] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[10] *Id.*

K.S.A. 2010 Supp. 44-508(d) states in part:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

K.S.A. 2010 Supp. 44-508(e) states in part:

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

The phrase "suffers disability . . . by the normal activities of day-to-day living" is subject to more than one interpretation:

> Under one interpretation, the injury is the result of day-to-day living – say, degeneration of a joint that occurs because of the ongoing strain that is placed on the joint both away from the job and on the job. Under the second interpretation, the injury is the result of the same *kind* of activity that may take place on the job as off the job – say, twisting the body to reach for an object. The syntax of the statute suggests that the former interpretation is correct, in that the wear of day-to-day living resembles the results of the natural aging process and is not like the stress of the worker's usual labor. Our courts have nevertheless at times followed an interpretation closer to the second way of reading the statutory language.[11]

Whether an injury arises out of employment depends on what claimant was doing when injured:

> [T]he proper approach is to focus on whether the injury occurred as a consequence of the broad spectrum of life's ongoing daily activities, such as chewing or breathing or walking in ways that were not peculiar to the job, or as a consequence of an event or continuing events specific to the requirements of performing one's job. "The right to compensation benefits depends on one simple test: Was there a work-connected injury?"

---

[11] *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 590, 257 P.3d 255, 259 (2011).

. . .

> Even though no bright-line test for whether an injury arises out of employment is possible, the focus of inquiry should be on the whether the activity that results in injury is connected to, or is inherent in, the performance of the job. The statutory scheme does not reduce the analysis to an isolated movement – bending, twisting, lifting, walking, or other body motions – but looks to the overall context of what the worker was doing – welding, reaching for tools, getting in or out of a vehicle, or engaging in other work-related activities.[12]

Bryant held that reaching for a tool belt and bending to weld were not normal activities of day-to-day living.[13]

Boeckmann[14] concerned a claimant who had a degenerative hip condition for over a decade. He stooped to pick up a tire at work and became unable to work thereafter. Mr. Boeckmann's injury did not arise out of his employment. The evidence was:

> . . . his employment did not cause his condition to occur; that the hip condition had been a progressive process; . . . that almost any everyday activity has a tendency to aggravate the problem; that every time the claimant bent over to tie his shoes, or walked to the grocery store, or got up to adjust his TV set there would be a kind of aggravation of his condition.
> . . .
>
> "[E]veryday bodily motions required by claimant's work gradually and imperceptibly eroded the physical fibers of his structure, as the patient drip of water wears away the stone. The examiner found, on what we deem sufficient evidence, that any movement would aggravate Boeckmann's painful condition and there was no difference between stoops and bends on the job or off."[15]

"[I]njuries caused by or aggravated by the strain or physical exertion of work do not arise out of employment if the strain or physical exertion in question is a normal activity of day-to-day living[,]"[16] such as injuring a knee while turning in a chair and attempting to stand to reach for an overhead file. The claimant in *Johnson* had a significant preexisting knee condition. Her treating doctor testified she "had years of degeneration and . . . it was

---

[12] *Id.* at 595-96.

[13] *Id.* at 596.

[14] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

[15] *Id.* at 738-39.

[16] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 790,147 P.3d 1091, *rev. denied* 281 Kan. 1378 (2006).

just a matter of time" and there "wasn't anything particular about the swiveling in her chair that would be anymore likely to [injure claimant] than getting out of a car or getting out of bed or just standing up or anything else."[17]

An injury generally does not arise out of employment if it was due to a risk to which the worker was equally exposed outside of employment:

- Even where an injury occurs at work, it is not compensable unless it is "fairly traceable to the employment," as contrasted with hazards to which a worker "would have been equally exposed apart from the employment."[18]

- A claimant with prior back problems who sustained a specific injury on the employer's premises when twisting to get out of truck did not sustain a compensable injury because his injury was due to a personal risk: "Considering the history of claimant's back problems, it is obvious that almost any everyday activity would have a tendency to aggravate his condition, i.e., bending over to tie his shoes, getting up to adjust the television, or exiting from his own truck while on a vacation trip."[19]

- An injury from sitting, bending or twisting was not compensable. Such movements were normal activities of day-to-day living.[20]

- An injury was not compensable where claimant fell and broke his femur after feeling pain in his leg while walking to pick up an order for a customer. There was no proof claimant was required to walk at work, either to a greater degree or dissimilar manner, than he would in his personal life.[21]

"Workers compensation should be reserved for persons who are injured on the job due to hazards specifically associated with that particular work, not for persons who come to an employer with a preexisting disease and suffer the inevitable consequences of that disease while they happen to be at work."[22]

---

[17] *Id.* at 788.

[18] *Siebert v. Hoch*, 199 Kan. 299, Syl. ¶ 5, 428 P.2d 825 (1967).

[19] *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 300, 615 P.2d 168 (1980).

[20] *Brazil v. Bank One Corp.*, No. 100,989, 209 P.3d 765 (Kansas Court of Appeals unpublished opinion filed Jun. 26, 2009), *rev. denied* 290 Kan. 1092 (2010).

[21] *Meyer v. Nebraska Furniture Mart*, No. 107,424, 286 P.3d 576 (Kansas Court of Appeals unpublished opinion filed Oct. 12, 2012).

[22] *Martin v. CNH America LLC*, 40 Kan. App. 2d 342, 195 P.3d 771 (2007), *rev. denied* 286 Kan. 1178 (2008).

Injuries occurring due to an increased employment risk generally result in compensability. For instance, work on a rooftop made claimant a more accessible target for a sniper.[23] Constantly entering and exiting vehicles was an increased employment risk that a claimant was not equally exposed to away from work.[24] Captive standing for prolonged periods at work was not a normal everyday activity.[25]

The "going and coming" rule contained in K.S.A. 2010 Supp. 44-508(f) states:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

The Kansas Supreme Court observed in *Thompson:*

> The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.[26]

"[A] worker who is traveling to and from work is not generally covered by the Act because mere travel to and from work does not, by definition, arise out of and in the course of employment."[27] The "going and coming" to work rule is not applicable where travel is a necessary and integral part of the employment.[28]

---

[23] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 261-62, 597 P.2d 641 (1979).

[24] *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, 11, 61 P.3d 81 (2002).

[25] *Poff v. IBP, Inc.*, 33 Kan. App. 2d 700, 710, 106 P.3d 1152 (2005).

[26] *Thompson* v. *Law Offices of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

[27] *Scott v. Hughes*, 294 Kan. 403, 414, 275 P.3d 890, 899 (2012).

[28] See *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973); see also *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan.1042 (1984).

"A fixed-situs employee does travel to the job site in order to perform the business of the employer, but the Act excises this activity from the scope of compensation in order to keep the employer's burden manageable. In light of the cases cited above, when determining whether a given daily commute is within the scope of the Act, an increased risk to the employee or an increased utility to the employer is a useful indicator of whether the inherent travel exception should apply."[29]

". . . Kansas case law recognizes a distinction between accidents incurred during the normal going and coming from a regular permanent work location and accidents incurred during going and coming in an employment in which the going and coming is an incident of the employment itself."[30]

ANALYSIS

Claimant's accidental injury arose out of and in the course of his employment.

Respondent acknowledges that claimant loading supplies was a work-related task. Respondent also concedes claimant's traveling was a work-related task. However, respondent argues claimant's getting into his own truck prefatory to driving to his first service call was not a work-related activity, such injury bore no causal connection to the nature and incidents of his employment, and he was not in respondent's service when injured.[31]

Claimant's injury occurred while he was performing work in respondent's service. Claimant, who did not have a fixed work site and was allowed to work from home, was in the course of his employment. The nature, conditions, obligations, and incidents of his employment allowed him to store supplies at home and travel from home to various job sites. Claimant's job unquestionably required that he travel from site to site. Part of that travel involved his frequently getting in and out of vehicles, which is an increased employment risk. The causal connection between the work and the injury is apparent to the rational mind. Quite simply, his accident arose out of and in the course of his employment.

---

[29] *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 546, 18 P.3d 278, 282 (2001), *rev. denied* 271 Kan. 1035 (2001); see also *Ostmeyer v. Amedistaff, L.L.C.*, No. 101,909, 220 P.3d 593 (Kansas Court of Appeals unpublished opinion dated Dec. 11, 2009).

[30] *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 773-774, 955 P.2d 1315, 1321 (1997); see also *Kennedy v. Hull & Dillon Packing Co.*, 130 Kan. 191, 285 Pac. 536, 538 (1930) ("His employment differs from one employed in the factory who might have been injured on his way to the factory where his work was to be performed. In such a case the worker would not be entitled to compensation.").

[31] Respondent's Brief at 8-9, 11, 15 (filed Sep. 20, 2013).

Respondent argues K.S.A. 2010 Supp. 44-508(e) precludes compensability. The statutory definition of "injury" excludes disabilities that are the result of the natural aging process or the "normal activities of day-to-day living." The statute essentially excludes personal risks from coverage under the Kansas Workers Compensation Act.

Bryant controls. Mr. Bryant's reaching for a tool belt and bending to weld were work activities, not normal activities of day-to-day living. The Kansas Supreme Court noted:

> Even though no bright-line test for whether an injury arises out of employment is possible, the focus of inquiry should be on the whether the activity that results in injury is connected to, or is inherent in, the performance of the job. The statutory scheme does not reduce the analysis to an isolated movement – bending, twisting, lifting, walking, or other body motions – but looks to the overall context of what the worker was doing – welding, reaching for tools, **getting in or out of a vehicle**, or engaging in other work-related activities (emphasis added).[32]

The evidence shows claimant's torn left meniscus resulted from the performance of his job duties. In the sense that he would get in and out of vehicles more frequently than the general public, he was exposed to a greater hazard or risk than to what he would otherwise have been exposed in his normal day-to-day living. Respondent put on no evidence that the risk to which claimant was exposed was one that he was equally exposed outside of employment. Claimant was not injured performing a personal task, but a work task. Claimant was not on a personal mission[33] and he was not deviating from his work.[34]

Respondent cites *Johnson* as controlling. This case is dissimilar to *Johnson*, *Martin* and *Boeckmann*, where the medical evidence established the claimants had preexisting conditions that would be aggravated by virtually any activity and it was just a matter of time before their injuries occurred. There is no evidence that claimant's knee injury was just a "ticking time bomb" that was set to explode regardless of work.

---

[32] *Bryant v. Midwest Staff Solutions*, 292 Kan. 585, 596, 257 P.3d 255 (2011); see also *Brackett v. Dynamic Educational Systems*, No. 108,134, 297 P.3d 1194 (Kansas Court of Appeals unpublished opinion filed Mar. 29, 2013) ("While the activity which caused Brackett's injury – exiting her personal vehicle – is a common activity in daily life, the overall context in which Brackett was performing the activity convinces us that her back injury is compensable.").

[33] See *LaRue v. Sierra Petroleum Co.*, 183 Kan. 153, 157, 325 P.2d 59 (1958); see also *Williams v. Petromark Drilling*, LLC, 49 Kan. App.2d 24, 303 P.3d 719 (2013), *pet. for review filed* July 8, 2013. Kansas Supreme Court rule 8.03(i) states the timely filing of a petition for review stays the Court of Appeals' ruling. Pending the Supreme Court's determination on the petition for review, or the Supreme Court ruling on the case based on the merits, *Williams* is not binding and, while cited, does not impact the Board's ruling.

[34] See *Sumner v. Meier's Ready Mix, Inc.*, 282 Kan. 283, 144 P.3d 668 (2006).

This case is somewhat similar to *Anderson*,[35] in which a claimant heard a pop in his back entering a Chevrolet Suburban as part of his work installing upholstery. The Kansas Court of Appeals viewed Mr. Anderson's constantly entering and exiting vehicles as a hazard of his employment. The Board does not read *Anderson* as indicating only repetitive ingress and egress to and from vehicles results in compensability because such case involved a one-time, traumatic injury.

Respondent argues the judge erroneously applied the inherent travel exception to the going and coming rule to find claimant's case compensable. It is not clear whether the Award was actually based on application of the so-called inherent travel exception to the going and coming rule. Judge Howard, while citing some going and coming cases, did not affirmatively state the decision was based on such exception. However, it is evident Judge Howard concluded claimant had already commenced his work – when he was loading his truck with chemicals – about 20 minutes before the accident. Further, it is evident Judge Howard concluded claimant was working when he got into his truck to go to his first service call.

The Board need not delve too deeply into analysis of the so-called inherent travel exception to the coming and going rule. Such "exception" to the going-and-coming rule "is not an exception to K.S.A. 2010 Supp. 44-508(f) at all, but a method to determine whether an employee has already assumed the duties of employment . . . ."[36] Further, "[w]here travel is truly an intrinsic part of the job, the employee has already assumed the duties of employment once he or she heads out for the day's work. Thus, the employee is no longer 'on the way to assume the duties of employment' – he or she has already begun the essential tasks of the job. Such an employee is covered by the Workers Compensation Act and is not excluded from coverage by the going-and-coming rule."[37] Making a factual determination whether a worker has already commenced working is not a judicial exception to the going and coming rule.[38]

Claimant's work plainly required extensive travel. The going and coming rule does not apply because claimant was already working when he was injured. Claimant need not have been on respondent's premises to sustain a compensable accidental injury.[39]

---

[35] *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, 61 P.3d 81 (2002).

[36] *Craig v. Val Energy, Inc.*, 47 Kan. App. 2d 164, 168, 274 P.3d 650 (2012), *rev. denied* May 20, 2013.

[37] *Halford v. Nowak Const. Co.*, 39 Kan. App. 2d 935, 942, 186 P.3d 206, 212 (Leben, J., concurring) *rev. denied* 287 Kan. 765 (2008).

[38] *Quintana v. H.D. Drilling, LLC*, Nos. 106,126, 106,127 & 106,131, 276 P.3d 837 (Kansas Court of Appeals unpublished opinion filed May 11, 2012).

[39] *Newman v. Bennett*, 212 Kan. 562, 568, 512 P.2d 497 (1973).

Respondent points out that the inherent travel exception is infinitely regressive, as many activities would be inherent to claimant's first service call, such as getting out of bed and leaving the house, but that such activities would never result in a compensable work-related injury. There is no need for the Board to analyze these hypothetical scenarios that have not been alleged. Moreover, the Board's decision is not rooted in the so-called inherent travel exception. Rather, the Board's factual determination is that claimant was neither going to or coming from work. He had already begun his work day and was injured while performing his work duties, which necessarily included travel.

Claimant sustained a 20% permanent functional impairment to his left leg; respondent proved no preexisting impairment.

Respondent asserts claimant failed to prove entitlement to permanent partial disability benefits because no doctor causally linked claimant's knee impairment to the January 4, 2011 accidental injury. Such proof is not necessary. Medical testimony as to the existence, nature and extent of a disability is not essential.[40] "Medical evidence is not essential or necessary to establish the existence, nature, and extent of a worker's injury."[41] "A claimant's testimony alone is sufficient evidence of his own physical condition."[42]

Respondent also requests credit for claimant's preexisting impairment. K.S.A. 2010 Supp. 44-501(c) states:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

When an assertion for a reduction of an award based on preexisting impairment is made, it is respondent's burden to prove the existence and degree of permanent impairment.[43] Respondent did not do so, so no credit is available. While claimant had some documented left knee symptoms over a three and one-half week period in mid-2006, there is no proof such symptoms resulted in any permanent impairment.

---

[40] *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, Syl. ¶ 3, 547 P.2d 751 (1976);

[41] *Graff v. Trans World Airlines*, 267 Kan. 854, 864, 983 P.2d 258 (1999).

[42] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 95, 11 P.3d 1184, 1187 (2000), *rev. denied* 270 Kan. 898 (2001).

[43] *Id.* at 96.

Claimant is entitled to future and unauthorized medical.

The judge did not err in awarding the possibility of future medical treatment or unauthorized medical.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board affirms the Award Nunc Pro Tunc.

AWARD

WHEREFORE, the Board affirms the August 20, 2013 Award Nunc Pro Tunc.

IT IS SO ORDERED.

Dated this _____ day of December, 2013.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Ben Wagoner
50330 S.W. Pelican Point
Lee's Summit, MO 64082

Ryan D. Weltz
rweltz@wallacesaunders.com
bschmidt@wallacesaunders.com

Honorable Steven J. Howard